

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Notice of Inquiry Concerning a Review)	
of the Equal Access and)	CC Docket No. 02-39
Nondiscrimination Obligations)	
Applicable to Local Exchange Carriers)	

Comments of the Public Utility Commission of Texas

On February 28, 2002, the Federal Communications Commission (FCC) released a Notice of Inquiry (NOI) initiating a review of the applicability of section 251(g) of the Federal Telecommunications Act (FTA),¹ which imposes equal access and nondiscrimination obligations on incumbent local exchange carriers (ILECs). The FCC is seeking comment on what specific obligations remain in place today that apply to Bell Operating Companies (BOCs) — both with and without FTA § 271 authority to provide in-region long distance services — as well as to independent ILECs and competitive local exchange carriers (CLECs). In particular, the FCC is interested in finding out whether existing equal access and nondiscrimination requirements should be changed or eliminated in light of changes in market conditions, including the state of competition in the local market and BOC entry into the long distance market. Further, the FCC seeks comment on the circumstances under which marketing arrangements between BOCs (those with 271 authority versus those without) and other carriers are permissible. The FCC also seeks input on the relationship between FTA sections 272 and 251(g) and the marketing activities, such as outbound marketing, that BOCs with 271 authority may pursue.

The Public Utility Commission of Texas (Texas PUC), having general regulatory authority over public utilities within our jurisdiction in Texas, submits these comments in response to the *NOI*.

¹ Telecommunications Act of 1996, Pub L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C.) (Act).

NECESSITY OF FTA § 251(g)

The Commission seeks comment on how it should approach changing or eliminating existing equal access and nondiscrimination requirements, some of which are contained in existing FTA § 251(g), or whether it should replace current FTA § 251(g) requirements with new regulations. The Texas PUC is concerned that modifications and/or removal of the safeguards under the FTA relating to equal access and nondiscrimination may be premature, and encourages the Commission to retain the existing obligations.

The intent of the FTA's existing equal access and nondiscrimination safeguards was to provide ample opportunity and time for competition to develop in all markets and to prevent BOC discrimination in favor of their affiliates. The Texas PUC notes that the Commission is currently conducting a broad review of the existing regulatory regime surrounding interconnection and competition. Specifically, the Commission is reexamining its national list of unbundled network elements (UNEs), as well as national performance measurements for special access services, UNEs, and interconnection. The dominance of ILECs in the provision of broadband services, and how to develop regulations accordingly, is also being considered. In addition, the Commission recently concluded that cable modem services also fall under the scope of information services, and has tentatively concluded that wireline broadband Internet access is an "information service" with a "telecommunications" component.² The Texas PUC also notes that, in addition to FTA § 251(g), BOCs are required to provide ISPs with comparably efficient interconnection (CEI) and open network architecture (ONA), requirements that the Commission is also considering modifying and/or removing in its *Broadband Information Services NPRM*.³

² Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Notice of Proposed Rulemaking, CC Docket No. 01-338 (rel. Dec. 20, 2001); Performance Measurements and Standards for Interstate Special Access Services, et al., Notice of Proposed Rulemaking, CC Docket No. 01-321 (rel. Nov. 19, 2001); Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al., Notice of Proposed Rulemaking, CC Docket No. 01-318 (rel. Nov. 19, 2001); Development of a Regulatory Framework for Incumbent LEC Broadband Services, Notice of Proposed Rulemaking, CC Docket No. 01-337 (rel. Dec. 20, 2001); Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, GN Docket No. 00-185 (rel. March 15, 2002); and Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Notice of Proposed Rulemaking at ¶30, CC Docket No. 02-33 (rel. Feb. 15, 2002) (*Broadband Information Services NPRM*).

³ *Broadband Information Services NPRM* at ¶¶47-48.

The Texas PUC is concerned that, without these equal access and nondiscrimination safeguards, the risk is greater that the local exchange, information services and long distance markets may migrate to a vertically integrated intermodal model, as opposed to the current intramodal model that supports various competitors in each of these markets. For instance, it is conceivable that without these requirements, BOCs and other LECs could lack incentive to retain today's open networks, which allow competing LECs, IXC's and ISPs access to their customers. The foreseeable result could be a closed network platform where customers purchase all of their services — e.g., local, long distance and Internet access — from their LEC. Such vertical integration could in turn result in: (1) reduced competition in the information services and long distance markets, as ISPs and IXC's would no longer be able to access the consumer through the landline local network; and (2) only intermodal competition to the exclusion of intramodal competition, with various network providers, such as wireless, satellite, and cable, competing with the LEC for customers. In addition, it is unclear what impact a reduced number of competitors and intermodal competition would have on consumer product pricing.

Though great strides have been made in the legislative and regulatory arena to encourage competition in these markets, the competitive telecommunications industry in Texas is still in its' formative years and continues to evolve. The Texas PUC is concerned that elimination of equal access and nondiscrimination requirements could halt competition before it has had sufficient opportunity to take root, and may have an impact on market entry, as well as the market share of competitive carriers in these markets. Indeed, the Texas PUC believes that these obligations may provide needed market certainty that will ensure the continued development of competition in these markets.

The Texas PUC therefore strongly cautions the Commission to consider the impact a "flash cut" removal of these equal access and nondiscrimination requirements could have on the state of competition in the information services, local exchange and long distance markets. Assuming that the Commission retains its preliminary determination that wireline broadband Internet access service is an information service, the Texas PUC strongly encourages the

Commission to retain, or to gradually phase out, the existing equal access and nondiscrimination requirements for ISPs in order to avoid a flash cut to a completely unregulated marketplace.

Therefore, the Texas PUC encourages the Commission to be cautious in making any determination in light of current market conditions, and believes that continued cooperation between the states and the Commission remains key to encouraging competition in local markets and the deployment of next generation services to a broad cross-section of consumers. We strongly encourage the FCC to balance the interests of all sides in this complex issue.

BOCs WITH 271 AUTHORITY

The Commission seeks comment on potentially different equal access and nondiscrimination obligations for BOCs that have received 271 approval and are providing interLATA services through a separate affiliate, versus those that have not yet demonstrated that their local market is competitive enough to gain 271 approval.

Through the enactment of FTA § 271, Congress established a system of safeguards for consumers and competitors that must be met prior to permitting the BOCs to enter the long distance market within their operating territory. The Texas PUC, after extensive hearings and a collaborative process with Southwestern Bell Telephone (SWBT) and Texas CLECs, supported SWBT's 271 application to enter the long distance market in this state, and approval was granted by the FCC in June 2000. During that process, the Texas PUC established performance measures to assess SWBT's continued performance in opening local markets to competitors, and this data is reviewed every six months.

While it has been over six years since the passage of the FTA, and almost two years since SWBT was granted entry into the long distance market in Texas, CLECs still serve only about 14% of the end user switched access lines in Texas.⁴ Therefore, the Texas PUC encourages the Commission to retain its existing equal access and nondiscrimination requirements for BOCs,

⁴ *Local Telephone Competition: Status as of June 30, 2001* at Table 7, Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division, February 2002.

and in particular, for those that have obtained 271 approval. The Texas PUC believes that such requirements will provide the necessary market certainty that will allow the continued development of competition in the local, long distance and information services markets as envisioned in the FTA.

PERMISSIBLE MARKETING ACTIVITIES

The Commission seeks comment on the relationship between FTA §§ 251(g) and 272, and what marketing activities between a BOC's local exchange and interLATA affiliate are permissible. The Commission also seeks comment on whether the Commission should compile a list of permissible activities to promote regulatory certainty. The Texas PUC has established rules that generally govern how certain products are marketed by ILECs, with the overarching goal of providing consumers with the benefits of competition.⁵ For instance, our rules require ILECs to protect customers' proprietary information,⁶ to provide customers with user-friendly customer bills,⁷ to provide disclosures of their customer rights and terms and conditions of service,⁸ and to require ILECs to file tariffs with the Texas PUC for approval of new services and/or rates.⁹ In addition, state law protects against predatory pricing by IXC's,¹⁰ and imposes imputation requirements on ILECs to protect against anticompetitive pricing practices with competing providers.¹¹

Nevertheless, we have concerns that the actions taken by some of the BOCs to provide long distance service through joint marketing arrangements may undermine the intent of Congress and thus bypass the 271 safeguards that benefit competition and customers. For

⁵ In addition, the Texas legislature has mandated equal access and dialing parity requirements for intraLATA toll traffic. *See* Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 55.-007(a)(4), 55.009(c), 56.025(d) (Vernon 1998 & Supp. 2002)(PURA). Further, the Texas PUC has formulated intraLATA equal access rules. P.U.C. SUBST. R. 26.275.

⁶ P.U.C. SUBST. R. 26.122.

⁷ *Id.* at 26.25.

⁸ *Id.* at 26.31.

⁹ *Id.* at 26.209, 26.210, 26.224-227.

¹⁰ PURA § 52.107.

¹¹ *Id.* at §§ 60.061, 60.063. *See also* P.U.C. SUBST. R. 26.226, 26.274.

example, in Texas, competing long distance carriers have complained that SWBT, since receiving 271 approval in this state, has engaged in intra-corporate cross-subsidization practices with its long distance affiliate that have enabled it to engage in price squeezes for interLATA and intraLATA telecommunications services that are anti-competitive, predatory, unreasonably preferential and discriminatory.¹² In addition, in a recent Arbitration proceeding at the Texas PUC, the Arbitrators found that SWBT was refusing to allow CLEC customers to presubscribe to SWBT's intraLATA toll service, a clear violation of existing state law and the FTA's pro-competitive policies; the Arbitrators therefore ordered SWBT to provide toll service on a nondiscriminatory basis.¹³

Therefore, the Texas PUC believes that a list of permissible marketing practices that would apply to BOC interexchange affiliates would provide needed regulatory and market certainty that will protect consumers and encourage continued development of a competitive marketplace. The Texas PUC believes that it is particularly important that any federal policies adopted as a result of this *NOI* or other Commission action not counter consumer protections already in place in Texas, and strongly encourages the Commission to develop this list with the close cooperation of the states.

CONCLUSION

We appreciate the opportunity to offer our comments in this proceeding. The Texas PUC believes that ensuring the continued development of competition should be a collaborative effort between the Commission and the states. While the Texas PUC believes that excessive regulation must be avoided, the Texas PUC cautions the Commission that the complete and sudden removal of existing equal access and nondiscrimination requirements may have far-reaching and

¹² *Complaint of AT&T Communications of Texas, L.P. against Southwestern Bell Telephone Company and Southwestern Bell Communications Service, Inc. d/b/a Southwestern Bell Long Distance* at 2-3, Docket No. 23063 (Sept. 22, 2000) (pending).

¹³ *Petition of MCIMetro Access Transmission Services, LLC, Sage Telecom, Inc., Texas UNE Platform Coalition, McLeod USA Telecommunications Services, Inc. and AT&T Communications of Texas, L.P. for Arbitration with Southwestern Bell Telephone Company under the Telecommunications Act of 1996*, Docket No. 24542, Arbitration Award at 201-203 (not yet released). The Texas PUC Commissioners presided over the Arbitration, and found that SWBT is obligated under PURA § 55.009(c) to allow CLEC local service customers to presubscribe to SWBT as their intraLATA toll carrier.

unforeseen implications that could adversely impact today's fragile local market. The Texas PUC believes that any removal of these obligations must be undertaken with the close cooperation of the states, and remain true to the market opening provisions of the FTA. We recommend that the Commission carefully review the impact of the BOC's actions on the fragile establishment of a competitive local telecommunications market, as well as the impact on competition in long distance, local exchange and information services markets.

**Respectfully submitted,
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May 10, 2002

**/original signed/
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